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U.S. Department of  
Transportation  
Office of the Secretary  
of Transportation

**General Counsel**

1200 New Jersey Avenue, S.E.  
Washington, D.C. 20590

April 30, 2010

Ms. Cynthia Brown  
Chief of the Section of Administration  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423

Re: Finance Docket No. 35305

**ENTERED**  
**Office of Proceedings**

**APR 30 2010**

**Part of**  
**Public Record**

Dear Ms. Brown:

Enclosed herewith for filing in the above-referenced proceeding please find the Reply Comments of the United States Department of Transportation. Please contact me if you have any questions.

Respectfully,

A handwritten signature in cursive script, reading "Paul Samuel Smith".

PAUL SAMUEL SMITH  
Senior Trial Attorney

(202) 366-9280

Enclosure

cc: All Parties of Record

**Before the  
Surface Transportation Board  
Washington, D.C.**

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ARKANSAS ELECTRIC COOPERATIVE CORPORATION )  
-- PETITION FOR DECLARATORY ORDER )

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F.D. No. 35305

**Reply Comments of the  
United States Department of Transportation**

In this proceeding the Surface Transportation Board ("STB" or "Board") considers the reasonableness of a tariff rule that makes shippers responsible for restricting the amount of coal dust escaping from their shipments to limits established by a rail carrier.<sup>1</sup>

Under certain conditions the accumulation of coal dust on and around railroad tracks can foul the ballast and thereby threaten the integrity of affected lines. The United States Department of Transportation ("DOT" or "Department"), through the Federal Railroad Administration ("FRA"), oversees safety in the railroad industry and regulates ballast in particular. The obvious safety implications of coal dust emissions and assertions made in this proceeding make it important to underscore both that rail carriers remain responsible for complying with applicable FRA regulations and that it is immaterial from a safety perspective whether the measures necessary to mitigate the hazards are undertaken by railroads or by shippers.

The BNSF Railway Company ("BNSF") tariff rule at issue must be reasonable, which means that the Board must be satisfied that the methodology on which it is based is sound.

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<sup>1</sup>/ Coal shipments that are subject to contracts under 49 U.S.C. § 10709 are not within the Board's jurisdiction. All of the comments contained herein refer only to shipments transported pursuant to common carrier tariffs.

Railroads are also responsible for maintenance of their infrastructure as part of their common carrier obligation. But shippers otherwise secure their property for transportation as a matter of course, and when failure to do so creates problems shippers should be responsible for the incremental cost of resolving them. Sound public policy counsels in favor of the most cost-effective solution(s).

### FRA Track Regulations

The record clearly demonstrates that coal dust does escape from trains in the Powder River Basin ("PRB") coal fields and that some quantity falls on or in the immediate vicinity of tracks, including the ballast. *See, e.g.* Opening Evidence and Argument of Union Pacific Railroad Company ("UP") at 5-6; BNSF Opening Evidence and Argument at 1-4, Exhibits 1 through 4. The record also shows that under certain circumstances, particularly when wet, coal dust can undermine the integrity of ballast. UP, Verified Statement ("VS") of David Connell at 13 (*citing* Tutumluer, Erol, *Laboratory Characterization of Fouled Railroad Ballast Behavior*, *Journal of the Transp. Research Board*, March 2009, at 100-01); BNSF at 4-5, VS of Craig Sloggett at 3-6.

Some parties have suggested that the combination of these facts and FRA's plenary authority over rail safety means that FRA should determine whether BNSF's coal dust emission limits are appropriate and would prevent derailments. Initial Comments of American Public Power Association, Edison Electric Institute, and National Rural Electric Cooperative Association at 6-7. The nature of FRA ballast regulations makes it neither necessary nor

appropriate for FRA to do so. However, it is important to clarify the relevance and application of those rules in this proceeding.<sup>2</sup>

FRA has adopted comprehensive regulations that prescribe minimum track safety standards. 49 C.F.R. Part 213. Some provisions, like those on track structure, impose numerous detailed requirements for many physical aspects of railroad track where adherence to precise specifications is important (*e.g.*, crossties and gage restraint measurement systems). *See* 49 C.F.R. §§ 213.109 and .110, respectively. By contrast, the rules most germane to this proceeding are those governing ballast, and they are not prescriptive but performance-based:

**Ballast; general.**

Unless it is otherwise structurally supported, all track shall be supported by material which will--

- (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
- (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
- (c) Provide adequate drainage for the track; and
- (d) Maintain proper track crosslevel, surface, and alinement.

49 C.F. R. § 213.103. *See also* 49 C.F.R. § 213.334.

Ballast, then, must distribute loads while simultaneously maintaining specific track geometry metrics and providing adequate drainage. It can only perform these functions if it is at once strong, stable, and porous.<sup>3</sup> FRA standards are performance-based because ballast must

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<sup>2</sup>/ The STB also invited agencies with relevant expertise to participate. Decision served December 1, 2009 at 3.

<sup>3</sup>/ Crosslevel, surface, and alinement are elements of track geometry that the track owner must maintain pursuant to the regulations in subpart C to Part 213. The ballast must support the track so that the track geometry is maintained to FRA's mandated minimum safety standards. There are different measurement parameters for each element specific to each class of track. If FRA determines that a track owner is not maintaining the track to the requirements of its particular class of track, civil penalties and other enforcement tools are available. *See* 49 CFR Part 209. If the

meet these needs in a variety of circumstances that defy uniformity.<sup>4</sup> Accordingly, FRA does not prescribe the type of ballast or the amount of ballast that a track owner must use; compliance is determined by whether the ballast performs the functions that it is required to perform with respect to each specific segment of track.

Properly understood, FRA regulations require BNSF to ensure that the ballast of the PRB Joint Line track performs the functions specified. BNSF may do so in a variety of ways, as long as its choices do not themselves violate applicable regulations or otherwise threaten safety. None of the alternatives reflected in the record of this proceeding, whether undertaken by railroads (via maintenance of way) or coal shippers (by profile loading, spraying surfactant, etc.) do so. The result is that DOT has no objection to BNSF's tariff rule from a safety perspective.

#### Reasonableness of the Tariff Rule

The Board has broad discretion to consider the reasonableness of a rule or practice, tailoring its analysis to the facts and arguments of each case. *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 (1<sup>st</sup> Cir. 2005). There are a great many factual questions in this case concerning, *inter alia*, the methodology employed by BNSF in collecting and analyzing coal dust and translating those measurements into the quantitative standards of its tariff rule. The Department

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track meets the standards for a lower class of track, the track owner may adjust the class of track to the lower class and be in compliance with the federal regulations.

<sup>4</sup> / The track in the Powder River Basin, for example, must withstand enormous loads on a very frequent basis, while lightly used rail lines may be appropriately supported with very different ballast materials and amounts. Other factors that bear on this question are inclines, soil conditions, curves, etc. Drainage rules are also couched as performance standards for the same reason. 49 C.F.R. §§ 213.33, 319. For additional detail see the FRA Track Compliance Manual, the pertinent portions of which are available at: [http://www.fra.dot.gov/downloads/safety/tss\\_compliance\\_manual\\_chapter\\_5\\_final\\_040107.pdf](http://www.fra.dot.gov/downloads/safety/tss_compliance_manual_chapter_5_final_040107.pdf)

takes no position on the ultimate question in this proceeding because we have no expertise in these matters. As explained below, however, DOT submits that the methodology employed and the limits produced by that methodology must be sound in order for the rule to be reasonable. We also offer our views on the factors the STB should consider in the circumstances of this case.

First, shippers of virtually every other product of which DOT is aware take steps to ensure that their property remains intact in or on rail cars during transport, either because the property has inherent value and/or because it can cause operational, safety, or other consequences if not properly secured.<sup>5</sup> There is no apparent reason why coal should be any different. The fact that the dust that escapes may have little value or that historically it has presented few consequences may explain why shippers and railroads have done nothing about it for a very long time. But that does not change the responsibility of the owner of the product being shipped to package or load the product so that it remains within the equipment being used for transport, especially if at some point consequences emerge. See *North American Freight Car Ass'n. v. BNSF Railway Co.*, STB Docket No. 42060 (Sub-No. 1) Decision served January 26 2007 at 6; *affirmed sub nom. North American Freight Car Ass'n. v. STB*, 529 F.3d 1166 (D.C. Cir. 2008).

Second, maintenance of way is a basic railroad responsibility. As noted previously, the specifics required for proper maintenance may vary according to physical environment, traffic volume, or other factors, but the underlying obligation to provide transportation upon reasonable

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<sup>5</sup>/ This is true of freight as disparate as automobile parts and containers as well as other commodities shipped in volume like grain. According to the record, even shipments that seem to have little inherent value and/or that pose only minimal problems if released (such as woodchips) must be secured by their shippers. Opening Evidence and Argument of UP at 11-12, VS of Douglas Glass at 6-7; BNSF's Opening Evidence and Argument at 18-19, VS of Gregory C. Fox. The Association of American Railroads ("AAR") has also adopted rules for loading open cars like those used for coal. See <http://www.aar.com/otlr.htm>

request is a constant. 49 U.S.C. § 11101. Coal traffic in the PRB is sufficiently voluminous that it likely not only demands very robust rail infrastructure but also entails substantial “wear and tear” thereon.<sup>6</sup> BNSF and UP would have to accept this as a matter of course in their maintenance programs even if no coal dust *ever* escaped from rail cars. But the properties of coal dust and the amounts in which it escapes in the PRB region add an element beyond normal wear and tear for which the owners of the coal dust are properly responsible.

Third, as a legal matter the means by which BNSF has chosen to hold coal shippers’ responsible must be reasonable. 49 U.S.C. § 10702. To decide that question the Board must be satisfied that BNSF’s methodology and results are sound. In other words, that the collection, measurement, and analysis of coal dust, as well as the translation of these data into quantitative limits, all have a well-grounded scientific basis such that they accurately capture the extent of the emissions and effectively redress their impact. The tariff rule must be more than “rational” from the railroad’s perspective; BNSF’s emission limits would be unreasonable if they were based upon faulty collection, measurement, or analysis of coal dust emissions or if they required steps that would not redress the problem. *See Consolidated Rail Corp. v. ICC*, 646 F.2d 642, 647-48 (D.C. Cir. 1981) (reasonable measures achieve their ends in a manner commensurate with their costs and do so efficiently compared to alternatives).

Shippers have challenged virtually every aspect of BNSF’s methodology and its efficacy. Opening Evidence And Argument of Arkansas Electric Cooperative Corp. (“AECC”) at 7-9, 16-

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<sup>6</sup>/ The AAR Yearbook of Railroad Facts recites that coal constitutes roughly 45 percent of total rail tonnage; PRB coal is roughly one-half of this. *See* <http://www.aar.org/InCongress/~media/AAR/BackgroundPapers/Railroads%20and%20Coal%20%20July%202009.ashx>

20, VS of Douglas G. De Berg; Opening Statement of National Coal Transportation Association ("NCTA") at 10-12 and Exhibit 1; Opening Evidence of Ameren Energy Fuels and Services Co. at 6-10. The Department appreciates that these very technical factual questions are not within the mainstream of the STB's experience and expertise. But the obvious alternative -- to deem the tariff rule reasonable or unreasonable without such an inquiry -- is unacceptable, for it would amount to the abrogation of the agency's responsibility to administer applicable law. DOT takes no position on the merits of these questions but believes that the Board must address those of significance.

Finally, sound public policy militates in favor of resolving the problem posed by coal dust emissions in the most cost-effective way. *See Consolidated Rail Corp, supra; International Union, United Auto., Aerospace & Agr. Implement Workers v. Occupational Safety and Health Administration*, 938 F.2d 1310, 1319 (D.C. Cir. 1991) (reasonableness requires a balancing of costs and benefits). In other words, absent a compelling reason to do otherwise, those alternatives that effectively address the issue with the least expenditure of resources should be preferred over those that require more.<sup>7</sup> It would be manifestly unreasonable from this perspective to insist upon higher-cost options.

The combination of these factors leads the Department to the following preliminary conclusion: Because the shippers should load their property so that it does not escape from the coal cars in the first place, the failure to do so should make them responsible for paying for the most cost-effective incremental mitigation measures. If, for example, that turns out to be

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<sup>7</sup> For example, shippers have alleged that additional maintenance of way by BNSF would be far less expensive than spraying surfactants by shippers, while BNSF points to the costs of reduced capacity that accompany maintenance. NCTA at 6; AECC at 16-20; BNSF at 5, 13, 22, and VS of Sloggett.



additional maintenance of way by BNSF that would not be required in the absence of coal dust emissions, then the shippers who do not keep the dust in the cars should reimburse the railroad.<sup>8</sup> DOT will inform the Board and the parties if material filed in the record simultaneously or subsequently hereto persuades us to modify this position.

### Conclusion

FRA will hold BNSF responsible for complying with ballast regulations regardless of whether it is the railroad or shippers that actually undertake the steps to address coal dust emissions. The tariff rule chosen by BNSF as the means to resolve the problems caused by coal dust must be reasonable, which means that the methodology the carrier has employed must be sound, the limits adopted must be effective, and that alternatives must not be clearly less costly. Because shippers must ensure that their property remains in rail cars, it is appropriate that they absorb the expenses of the most cost-effective option when their coal dust escapes.

Respectfully submitted;

A handwritten signature in black ink, appearing to read 'ROBERT S. RIVKIN', with a stylized, wavy line extending from the end.

ROBERT S. RIVKIN  
General Counsel


April 30, 2010

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<sup>8</sup>/ We note that BNSF has included a surcharge as a potential response for shipper failure to prevent the escape of coal dust. BNSF at 27.

**CERTIFICATE OF SERVICE**

I hereby certify that on this date I caused to be served a copy of the foregoing Reply Comments of the United States Department of Transportation via either e-mail or first-class mail, postage prepaid, on the all Parties of Record in STB Finance Docket No. 35305.

A handwritten signature in cursive script, reading "Paul Samuel Smith", written in black ink.

Paul Samuel Smith  
Senior Trial Attorney  
U.S. Department of Transportation

April 30, 2010